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D R A F T

COMMENTS IN OPPOSITION TO PROPOSED POLICY GUIDANCE ON MINORITY SCHOLARSHIP PROGRAMS

The National Women's Law Center submits these comments on behalf of itself and the undersigned organizations regarding the Department of Education's proposed policy guidance (PPG) on minority scholarship programs. In our view, the proposed policy guidance is deeply flawed and should be withdrawn for the following reasons. First, in disregarding the pervasive discrimination and underrepresentation suffered by racial minorities in higher education and focusing solely on the politically charged issue of "reverse discrimination," the policy misconstrues the history and remedial nature of our civil rights laws. Second, the policy ignores the very real problem of widespread discrimination in college and university scholarship programs against women and members of other protected groups. Finally, in setting up different rules for scholarship programs based on the source of funds within an institution for such programs, the policy directly contravenes the clear meaning of the Civil Rights Restoration Act and other principles of coverage, thereby laying the groundwork for the wholesale violation of the civil rights laws at issue.

Our interest as women's groups in this question is based on three concerns. First, we are deeply committed to the eradication of all forms of discrimination and its effects, very much including discrimination against racial minorities in higher education. Because targeted scholarship programs have been an effective tool to combat the tragic history of racial discrimination in this country and to enhance the access of racial minorities to higher education, we strongly support their continuation. The dual discrimination faced by women of color underscores our concern as well as the importance of the principles at stake. Second, many of the issues raised in the PPG including the place of affirmative action in education, and the misconstruction of the Civil Rights Restoration Act and other coverage principles such as "significant assistance," will directly and deleteriously affect women's access to higher education and to education in general. This is because Title IX, the principal federal law prohibiting sex discrimination in education, is modeled on and construed similarly to Title VI which is the legal basis for the PPG. Finally, the proposed policy's total disregard of the serious discrimination against women in scholarship programs is both inexplicable and inexcusable. For all of these reasons, we urge the Department to withdraw the proposed policy guidance and to address the real problems of discrimination in higher education.

I. The Civil Rights Laws Permit Education Institutions To Take Voluntary, Affirmative Steps To Address The Underrepresentation Of Protected Groups Without Requiring An Adjudication Of Discrimination

In prohibiting voluntary race targeted affirmative action scholarship programs, and limiting race targeted programs to situations where there have been actual findings of discrimination, the proposed policy guidance disregards the broad remedial purposes underlying the civil rights acts within its jurisdiction, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act and the Age Discrimination Act ("civil rights acts"). Indeed, the Department's own regulations specifically authorize both remedial and affirmative action programs under these statutes. See, e.g., 34 C.F.R. § 100.3 (b)(6) (Title VI); 34 C.F.R. § 106.3 (Title IX). Under both regulatory schemes recipients are specifically authorized, "in the absence of a finding of discrimination" to "take affirmative action to overcome the effects of conditions which resulted in limited participation . . . by persons of a . . ." particular sex, race, color or national origin. Id.

While the PPG acknowledges the regulation, it interprets it to prohibit scholarship programs specifically targeted to address the underrepresentation of members of the very groups protected by the statutes. Instead it would permit only those scholarship programs which enhance "diversity" within the university, with

diversity used in the most general sense of the term. This interpretation, which is accompanied by no analysis, would turn the civil rights acts which were enacted to prohibit and redress specific forms of pernicious discrimination into general, nearly meaningless statements of support for the proposition that universities benefit from having a broad range of students. That range, as contemplated by the PPG, includes minorities and women, to be sure, but it also includes oboe players and students from England. This reading of Title VI is simply not supportable.

Moreover, it raises grave questions about the continued vitality of any regulatory principle of affirmative action in education. As such, it has a chilling and deleterious effect, not only on scholarship programs but on other exceedingly important affirmative action programs designed to bring minorities and women into disciplines in which they have been historically underrepresented. These include, for example, programs to enhance the participation of girls and women in the study of math, science and computer technologies.

Contrary to the position of the PPG, the principle of voluntary, targeted affirmative action which is enunciated in both the Title VI and Title IX regulations is well-grounded in governing law. We incorporate by reference the excellent discussion in the Statement of the NAACP Legal Defense and Educational Fund, Inc. Opposing the Position of the Office of Civil Rights On Minority Targeted Scholarships submitted in response to the Department's May 30, 1991 request for comments

regarding the proper analysis of affirmative action to address racial discrimination and underrepresentation. Notwithstanding the recent decision in Podberesky v. Kirwan, No. 91-2577 (4th Cir. January 31, 1992), which will almost surely be appealed, we believe that the NAACP LDF position is the correct one which will ultimately be adopted by the courts.

We will take this opportunity to set out the legal authority for affirmative action to address inequities facing women and girls. The Supreme Court laid out the framework for this analysis in Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) where it addressed the question of whether Mississippi could provide an all women's nursing school as part of its system of higher education. The Court held that, because nursing was a traditionally female occupation which was dominated by women, the exclusion of males constituted a violation of the Fourteenth Amendment. However, the Court was careful to note that:

> In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.

Id. at 728. Indeed, the Court has consistently recognized that providing benefits to women, but not to men, is permissible in order to achieve a compensatory purpose. See, e.g., Califano v. Webster, 430 U.S. 313 (1977)(statutory classification which allowed women to eliminate more low-earning years than men in computation of Social Security benefits upheld because of workplace inequities); Schlesinger v. Ballard, 419 U.S. 498 (1975)(federal statute providing more time to female Naval

officers than to male Naval officers for promotion before mandatory discharge permissible based on limitations on females' service opportunities); Kahn v. Shevin, 416 U.S. 351 (1974)(upholding property tax exemption for widows but not widowers to cushion disproportionately heavy economic impact of spousal loss). See also Johnson v. Transportation Agency, 480 U.S. 616 (1987). In none of these cases was there an actual finding of discrimination; rather, the Court based its decisions on the view that distinctions favoring women were permissibly based on societal discrimination and/or underrepresentation.

The record is clear that there are serious problems of underrepresentation of racial minorities in higher education generally, to say nothing of the extreme history of racial discrimination in this country. Moreover, women are the victims of both historic discrimination and severe underrepresentation in a variety of disciplines including, for example, math, science, engineering and other technical areas. Targeted scholarship -- and other -- programs designed to redress this discrimination and expand opportunities are in full compliance with the governing law and should be permitted.

II. The Proposed Policy Guidance Inexplicably And Inexcusably Ignores The Serious Problem Of Discrimination Against Women In Scholarship Programs

The proposed policy guidance raises the question of whether it is a violation of the civil rights laws to target scholarship

resources to members of certain protected groups, particularly racial minorities. However, it inexplicably ignores the very real problem of scholarship discrimination against members of protected groups, including women and minorities, and in favor of whites and males. We find the Department's decision to devote its first major statement in many years on the subject of scholarship discrimination to "reverse discrimination" to represent a fundamentally wrong-headed policy. We urge the Department to re-examine its priorities and to put its resources into eradicating discrimination against those for whom the statutes were passed, and for whom the discrimination and the ensuing burdens have long been documented but remain unremedied.

While in this discussion we are focusing on sex-discrimination, it is equally important for the Department to address discrimination against members of protected groups on the basis of race and national origin under Title VI, disability under Section 504, and age under the Age Discrimination Act. The enforcement of all of these statutes is squarely within the Department's jurisdiction. Yet, despite its clear-cut and long-standing statutory obligations, the Department has largely ignored discrimination in scholarship programs across-the-board.

Scholarship discrimination against women takes a variety of forms. To begin with, it includes scholarship programs which, on their face, favor men. Title IX regulations permit scholarship programs

> established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by

> acts of a foreign government which require[] that awards be made to members of a particular sex specified therein; Provided, That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

34 C.F.R. § 106.37(b).

As originally proposed, the exception would have applied only to financial aid "established under a foreign will, trust, bequest, or similar legal instrument, or by a foreign government." Proposed regulation § 86.35, 39 Fed. Reg. 22236 (June 20, 1974). According to the materials accompanying the final regulation, the change in the rule which was eventually promulgated was based on comments from "colleges and universities claiming [that the stricter rule against sex-based scholarships which had originally been proposed] would cause to 'dry-up' a substantial portion of funds currently available for student financial assistance made available through wills, trusts and bequests which require that award be made to members of a specified sex." Preamble to the Title IX Regulations, Federal Register, June 4, 1975, Reprinted in Sex Discrimination Regulations, Hearings Before the Subcommittee on Postsecondary Education of the Committee on Education and Labor, House of Representatives, 94th Cong. 1st Sess. (1975) at 19. No facts or evidence were cited to support the claim that scholarship assistance would "dry up" if the original regulation were promulgated and, to the best of our knowledge, there has been no inquiry into this question since 1975.

In any event, regardless of the reasons underlying the

promulgation of this regulation over fifteen years ago, there is absolutely no justification for the continued regulatory approval of facially sex-discriminatory scholarships. We urge the Department to demonstrate that it is serious about ending scholarship discrimination by withdrawing this regulation. For the reasons discussed above, the only permissible sex-designated scholarships are those which evince a compensatory purpose. Such a purpose could include, for example, expanding opportunities for women to pursue studies in areas such as math, science, engineering, computer and other technical programs in which they have been historically underrepresented. It most assuredly does not include honoring the discriminatory whim of a donor.

The problems underlying this regulation are only compounded by the Department's lack of enforcement of the proviso. To the best of our knowledge, the Department has never investigated, let alone enforced or provided policy guidance regarding, the requirement that the "overall effect" of sex-specific scholarships be non-discriminatory. There is no hard data regarding the extent of sex-specific scholarship programs although anecdotal evidence strongly suggests, as one would expect, that these programs tilt heavily in favor of males. The lack of enforcement of the proviso also strongly counsels against extending this "principle" to the question of minority scholarships. There is no reason to believe that the Department would -- or could -- assure that "overall equity" is achieved in scholarships on the basis of race any more effectively than it

has done on the basis of sex. To the contrary, fifteen years of experience demonstrates that the concept is essentially meaningless and unenforceable.

A second example of blatant scholarship discrimination against women, and one which costs women at least tens of millions of dollars every year, is discrimination in athletic scholarship programs. Athletic scholarships are allocated and awarded on the explicit basis of sex. While, again, data is incomplete regarding the actual allocation of athletic scholarship dollars, available evidence confirms that the lion's share of these scholarship dollars are reserved for men only. NCAA statistics confirm that women get barely a quarter of these valuable scholarship dollars. (Raiborn, 1990 at 37).

Current Title IX regulations simply state that athletic aid should be awarded "in proportion to the number of students of each sex participating in . . . intercollegiate athletics." 34 C.F.R. § 106.36 (c). Despite repeated requests from groups including the National Women's Law Center and the National Coalition for Women and Girls in Education, and despite a number of administrative complaints which have been filed with the Office for Civil Rights which have raised the issue of sex discrimination in the allocation of athletic scholarships, the Department has failed to take steps to combat this very serious problem.

For example, it has refused to include discrimination against women in the allocation of participation opportunities --

or even meaningfully address participation discrimination which has kept women at approximately 30% of college athletes for well over ten years -- in the analysis of scholarship discrimination. This is in spite of the fact that given the linkage in the regulation between participation and scholarship aid, addressing discrimination in participation is absolutely crucial. It is also in spite of the fact that the one court to have addressed the issue specifically held that discrimination in allocating participation opportunities could not be used to justify scholarship discrimination. Haffer v. Temple University, 678 F. Supp. 517, 539 (E.D. Pa. 1987). In addition, the Department has persisted in adhering to a highly technical statistical analysis of "proportionality" which has the effect of permitting a college or university to grant a substantially higher proportion of aid to its male athletes than would be justified by a strict numerical application of the proportionality standard.

If the Department is serious about ending scholarship discrimination, the practice of earmarking approximately three-quarters of all athletic scholarship dollars for men only must be at the very top of the list. At the same time, because of the historic and pervasive discrimination against women in intercollegiate athletics, the Department must take compensatory steps to assure that female athletes receive a fair share of these dollars. It would be a blatant violation of Title IX to allow institutions of higher education to adopt so-called sex neutral criteria to keep in place a system which has

systematically and very effectively denied women anything resembling fair and equal treatment.

A final category of sex-based scholarship inequities stem from scholarship practices which, unlike those just discussed, are facially neutral but have a disparate impact on the basis of sex. Such "disparate impact" discrimination is clearly prohibited by the civil rights laws, including Title IX. The Supreme Court first addressed the question in Guardians Ass'n v. Civil Service Comm'n., 463 U.S. 582 (1983) where a majority held that Title VI's regulations properly prohibit practices which have the effect of discriminating on the basis of race or national origin. The Court unanimously reaffirmed this holding several years later in Alexander v. Choate, 469 U.S. 287, 293-94 (1985). A majority of the circuits have since explicitly recognized that a cause of action premised on the Title VI regulations properly extends to disparate impact discrimination. See, e.g., Larry P. v. Riles, 793 F.2d 969, 981-82 (9th Cir. 1984); Latinos Unidos de Chelsea v. Secretary of Housing, 799 F.2d 774, 785 n.20 (1st Cir. 1986); Craft v. Board of Trustees of University of Illinois, 793 F.2d 140, 142 (7th Cir.) cert. denied, 479 U.S. 829 (1986).

Title IX was expressly modeled on Title VI and is construed accordingly. Cannon v. University of Chicago, 441 U.S. 677, 695-96 (1979). Title IX cases have followed Guardians and have confirmed that Title IX also reaches disparate impact discrimination. Indeed, two of the leading Title IX cases have

specifically addressed sex discrimination in the award of scholarships. Most recently, in Sharif v. New York State Department of Education, 709 F. Supp. 345 (S.D.N.Y. 1989) Judge Walker applied a disparate impact analysis to find that New York's use of SAT scores to award state scholarships, which resulted in a disparate impact against young women, constituted a violation of Title IX. Similarly, in Haffer v. Temple University, 678 F. Supp. at 539-40 the court held that plaintiffs did not have to show an intent to discriminate in order to succeed on their claims of sex discrimination in the granting of scholarships in Temple University's intercollegiate athletic program.

While there is ample evidence of disparate impact discrimination in the award of scholarships and financial aid, the Department has failed to take any steps whatsoever to address -- or even acknowledge -- the problem. The inquiry starts very close to home within the financial aid programs administered by the Department of Education itself. According to the just published Fact Book On Women In Higher Education, American Council On Education (1991),

> [i]n all categories in which aid was awarded in fall 1986, women received on average fewer dollars than men. The greatest discrepancy was in federal work-study awards, where men received an average of 134% of what women received ($1,621 for men compared to $1,211 for women).

Id. at 113 (emphasis added).

Moreover, while male and female undergraduates received about the same average amount in federal grants, "the average

nonfederal grant for a man was 11% higher than for a woman ($2,046 compared to $1,848). Id. As a result, "[i]n fall 1986, an undergraduate man received an average of 7% more in total financial aid than an undergraduate woman ($3,996 compared to $3,740)." Id.

Sex-based differences in financial assistance persist for students pursuing doctoral studies. According to the American Council on Education, "[f]rom 1978 on, a higher proportion of women than men [has] used their own earnings, spouse's earnings, family contributions, and borrowings to support doctoral studies." Id. at 114. The statistics demonstrate that women are disproportionately consigned to the least advantageous mechanisms for financing their doctoral studies. For example, twenty-seven percent of women took out Guaranteed Student Loans as compared to only twenty-one percent of men. Id. Men, on the other hand, disproportionately profit from the more prestigious and advantageous financing mechanisms:

> [t]he greatest overall discrepancy between women and men in sources of support for doctoral studies between 1974 and 1987 occurred in the awarding of research assistantships. In 1974, women received 12% fewer of these awards than men; in 1985, they received 15% fewer; and in 1987, 10% fewer.

Id.

To the best of our knowledge, the Department has never even looked into the facts underlying these extremely troubling statistics to determine whether discrimination is present.

Other scholarship programs which have a clear-cut disparate impact on the basis of sex include programs which award

scholarships based on standardized test scores. A prime example is the National Merit Scholarship program which uses the Preliminary Scholastic Aptitude Test as the sole criterion for determining its semi-finalist pool from which all scholarship winners are selected. Year-in and year-out, between 60% and 66% of these prestigious scholarships -- totalling over $23 million annually -- are awarded to young men. (Rosser, The SAT Gender Gap: Identifying the Causes (1989) at 85). Other scholarship programs based on PSAT or SAT scores include, for example, scholarships awarded by the states of New York, Maryland, Massachusetts, Nevada and Rhode Island. Despite the fact that the only court to address the issue found that the use of SAT scores to award scholarships constitutes sex discrimination in violation of Title IX, Sharif v. New York State Department of Education, 709 F. Supp. at 345, the Department of Education has taken no steps whatsoever to address this problem.

In sum, the record is clear that there are serious problems of sex discrimination in the award of scholarships in higher education. The record is also clear that the Department of Education has done virtually nothing to address this discrimination. We find the Department's total disregard of sex discrimination in the award of scholarships and financial aid -- at the same time that it has chosen to expend substantial resources on the issue of reverse discrimination in scholarships -- to be both inexcusable and inexplicable.

III. The Proposed Policy Guidance Fails As A Matter Of Law As It Incorrectly Interprets Both The Civil Rights Restoration Act And The Principle of Significant Assistance

Finally, the proposed policy guidance seriously misconstrues two key aspects of the governing law as it seeks to carve out an exception to permit colleges to "administer private donor race-exclusive scholarships (a scholarship where the private donor restricts eligibility to students of designated races or national origins) where that aid does not limit the amount, type or terms of financial aid available to any student." The proposed distinction between "private donor race exclusive scholarships" which are "administered" by the institution and scholarships which are funded by the institution -- which is presented without explanation or legal justification -- is in direct contravention of both the Civil Rights Restoration Act (CRRA) passed by Congress in 1988 and the well-established principle that recipients may not circumvent the civil rights laws by extending significant assistance to an entity which discriminates.

A. The Civil Rights Restoration Act

Congress passed the CRRA to reverse the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984) which held that the civil rights acts' prohibitions against discrimination applied only to the particular programs and activities funded by federal dollars. The CRRA clarified that these laws prohibit discrimination in all activities of an

education institution which receives any federal funds, whether or not such funds flow to the particular activity at issue. It states in pertinent part:

> For the purposes of this title, the term "program or activity" and "program" mean all of the operations of-
>
> * * *
>
> (2)(A) A college, university, or other post-secondary institution, or a public system of higher education;

(emphasis added).

Congress' intent in framing this language is crystal clear. As the Senate Report explains:

> The Civil Rights Restoration Act of 1987 amends each of the affected statutes by adding a section defining the phrase "program or activity" and "program" to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance. . . . For education institutions, the bill provides that where federal aid is extended anywhere within a college, university, or public system of higher education, the entire institution or system is covered.

Sen. Rep. No. 100-64, 100th Cong. 1st Sess. (1987) at 4 (emphasis added). Accordingly, if it is a violation of the civil rights acts for a recipient institution to fund a race exclusive scholarship with its own funds, it necessarily follows that it is a violation of these laws to fund such a scholarship with private funds.

While the Department's effort to insulate "private donor" funds from its ban on race specific scholarships may serve the short-term purpose of preserving at least some of these scholarships, it has a long-term deleterious effect on the enforcement of the civil rights acts. This is based on the fact that by excluding "private donor funds" which are nonetheless

"administered" by the institution from the requirements of those laws, it creates a blueprint for avoiding the clear statutory prohibitions against discrimination in the four statutes at issue. If all an institution has to do to circumvent the civil rights laws is to obtain private funding for an activity in which it seeks to discriminate, we are returned to a reading of those laws which is even more restrictive and contrary to congressional intent than that encompassed in the discredited Grove City College decision. Indeed, in Grove City College itself, the Court held that the entire scholarship program was covered because of the government-funded scholarships which its students received.

Accordingly, we must vigorously protest the Department's theory for preserving some racially-targeted scholarships over the short-term but which will fundamentally undermine the enforcement of the civil rights laws over the long-term. The Department has no authority to differentiate between an institution's civil rights obligations based on the source of funds at issue. We respectfully request that it comply with the clear meaning of the Civil Rights Restoration Act.

B. Significant Assistance

The related concept of "significant assistance" is also implicated by the PPG's endorsement of an institution's ability to administer "private" race exclusive scholarship funds. The significant assistance principle bars institutions from engaging

in "shell games" to shift discriminatory activities to entities not themselves covered under the civil rights acts, and thereby shield the institution's dirty business of discrimination. While the short-term purpose of the exception in the PPG for private donor funds may appear attractive in that it permits private donors to designate scholarship funds in a race exclusive manner, in the long-term it fundamentally undermines the broader, very important principle.

Under the Title IX regulations recipients are prohibited from "providing significant assistance to any agency, organization or person which discriminates on the basis of sex in providing any aid, benefit, or service to students or employees." 34 C.F.R. § 106.31(b)(6). In the leading litigation regarding this regulation, the former fifth circuit interpreted it broadly to bar a University from having any relation with an honor society which admitted men only. Iron Arrow Honor Society v. Heckler, 702 F.2d 549 (5th Cir. 1983), dismissed as moot, 464 U.S. 67 (1983).

Title IX's financial aid regulations are even more specific. They prohibit a recipient from: "through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex." 34 C.F.R. § 106.37(a)(2). See also 34 C.F.R. § 100.3 (b)(4) (under Title VI prohibited discrimination in financial aid includes "benefits provided in or

through a facility provided with the aid of Federal financial assistance.")(emphasis added).

If an institution's administration of private donor restricted scholarships does not constitute significant assistance within the meaning of these regulations, there is nothing at all left to the principle. By so weakening the concept of significant assistance, the Department is, in effect, providing institutions with a blueprint of how to circumvent anti-discrimination requirements. There is no analytical difference between the practices authorized by the PPG in this regard and institutions which, for example, set up and expand "private" booster clubs to fund men's athletics programs but not women's, reinstitute all-male honor societies which are nominally run by their alumni and not the institution, and "contract out" the operation of housing facilities to permit superior accommodations to continue to be offered to young men.

We urge the Department to reject out of hand this approach and retain the broad prohibition of discrimination which is properly based in current law.

Conclusion

For the above stated reasons, we urge the Department not to promulgate the PPG as a final regulation. Instead, the Department should reinforce the longstanding principle that recipients are permitted to take race, sex, national origin, age and disability into account in order to address the underrepresentation of

protected groups in the academic community as well as historic discrimination against members of these groups. Moreover, the Department should devote its resources to eradicating the very real discrimination which continues to keep women and minorities from full and equal participation in academia.